

ISSUES

This is a review and modification proceeding in a claim for a June 8, 1994 back injury. After finding that claimant was now employed and his post-injury wage was \$532.91, the Judge averaged a 69 percent task loss with a 12 percent wage loss and reduced the permanent partial general disability rating from 85 percent to 40.5 percent.

The respondent Walter A. Young Construction Company, Inc., and its insurance carrier contend the Judge erred by failing to include the value of additional compensation items in the post-injury wage computation. They contend the post-injury wage is at least 90 percent of the pre-injury average weekly wage of \$600. Therefore, they contend the permanent partial general disability should be reduced to the 5 percent functional impairment rating.

Conversely, claimant contends the Judge erred by including overtime in the post-injury wage computation and by failing to factor in inflation in determining the actual wage loss. Additionally, claimant contends the Judge erred by failing to increase the task loss percentage from 69 percent to 92 percent.

The issues before the Appeals Board on this review are:

1. Is overtime or the value of additional compensation items included in the post-injury wage computation when neither were included in the pre-injury average weekly wage because neither were being paid or provided before the accident?
2. What is claimant's post-injury wage?
3. What is claimant's task loss?
4. What is the nature and extent of claimant's disability now that he has obtained employment?

FINDINGS OF FACT

After reviewing the entire record, the Board finds:

1. By Order dated December 30, 1997, the Appeals Board awarded Mr. Owings an 85 percent permanent partial general disability. That award was based upon a 69 percent task loss and a 100 percent difference in pre- and post-injury wages.
2. Because Mr. Owings had obtained employment and was no longer unemployed, on March 2, 1998, Walter A. Young Construction Co., Inc., and its insurance carrier filed this request to review and modify the initial award.

3. Mr. Owings obtained employment with Hobart Corporation in the fall of 1996. He now earns a base wage of \$460, works some overtime, and also receives some employer-paid medical and dental insurance and some retirement benefits.
4. As indicated above, at oral argument the parties agreed that the post-injury wage is \$460 if overtime and additional compensation items are excluded, \$506.54 if only overtime is included, and \$573.88 if both overtime and additional compensation items are included. Those numbers are supported by the wage records placed into evidence.
5. As a result of the back injury that he sustained on June 8, 1994, Mr. Owings has a 5 percent whole body functional impairment.

CONCLUSIONS OF LAW

1. The permanent partial general disability should be reduced to the 5 percent functional impairment rating.
2. Because Mr. Owings injured his back, his permanent partial general disability benefits are computed according to K.S.A. 44-510e. That statute provides:

The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. . . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

3. For purposes of the permanent partial general disability formula, Mr. Owings' post-injury wage is \$573.88, which includes both overtime and additional compensation items. Overtime and additional compensation items should be included in the post-injury wage as they have true and measurable economic value. Including those items when determining wage loss in the disability formula is consistent with K.S.A. 44-511.
4. Comparing \$573.88 to the pre-injury wage of \$600 yields a difference of only 4 percent. Therefore, because Mr. Owings is earning at least 90 percent of his pre-injury wage, his permanent partial general disability is limited to the 5 percent functional impairment rating.

5. Mr. Owings contends the Judge erred by failing to factor in inflation in determining the difference in pre- and post-injury wages. Mr. Owings attached to his submission letter to the Judge copies of government documents allegedly proving the effect of inflation on the wages paid to workers in the construction industry. Without commenting upon the merits of the argument or the weight those documents might have, the Appeals Board finds that the documents attached to the submission letter are not part of the evidentiary record. As far as we can determine, the documents were not presented until after the evidentiary record was closed and the parties have not otherwise stipulated to their being admitted.

6. Based upon the above conclusions, the issue whether Mr. Owings' task loss should be increased from 69 percent to 92 percent is rendered moot.

7. As provided by statute,¹ the effective date of the modification cannot be more than six months before the application was filed. The application was filed on March 2, 1998. Therefore, the effective date of the modification is September 2, 1997.

AWARD

WHEREFORE, the Appeals Board modifies the July 31, 1998 review and modification award and reduces the permanent partial general disability to the 5% functional impairment rating.

Greggory Brett Owings is granted compensation from Walter A. Young Construction Company, Inc. and its insurance carrier, CIGNA Insurance Company, and Steve Beyrle d/b/a/ Beyrle Construction, for a June 8, 1994. For the period from June 8, 1994, through September 2, 1997, Mr. Owings is awarded 11.14 weeks of temporary total disability benefits and 157.72 weeks of permanent partial disability benefits for an 85% permanent partial general disability. Based upon a \$600 average weekly wage, Mr. Owings is entitled to receive \$313 for 168.86 weeks for a total sum of \$52,853.18, which is due and owing unless previously paid.

After September 2, 1997, Mr. Owings' permanent partial general disability decreases to 5%. But no additional permanent partial disability is due as Mr. Owings has already been compensated for this lower disability rating by reason of the credit given for the weeks awarded at the higher disability rate.²

The Appeals Board adopts the remaining orders contained in the July 31, 1998 award to the extent they are not inconsistent with the above.

¹ K.S.A. 44-528.

² Wheeler v. Boeing Co., ___ Kan. App. 2d ___, 967 P.2d 1085 (1998).

IT IS SO ORDERED.

Dated this ____ day of April 1999.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

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